

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,816
22,898

JOSEPH ALEXANDER, Appellant,

v.

UNITED STATES OF AMERICA, Appellant.

UNITED STATES OF AMERICA,

v.

JOSEPH ALEXANDER, Appellant.

Appeals from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

REFERENCES TO RULINGS

In connection with the direct appeal (No. 21,816), the District Court did not write or deliver an opinion. The District Court delivered an oral opinion denying defendant's

motion for a new trial (No. 22,898). That opinion, and the formal order reciting the District Court's conclusions of law on the motion for new trial, are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The Course of the Proceedings

The consolidated appeals arise from a criminal prosecution in the United States District Court for the District of Columbia. On March 27, 1967, a grand jury returned a five count indictment charging appellant and one Clyde Griffith with two counts of robbery and three counts of assault with a dangerous weapon. The indictment involved two separate transactions: a hold-up at the Jefferson House Apartments on January 21, 1967 (counts one to three) and a robbery at the residence of Marvin W. Mundy (counts four and five). Prior to trial, the District Court ordered counts one to three severed from counts four and five. The present appeal concerns only the judgment and sentence arising from the first three counts of the indictment.^{1/}

^{1/} Following trial on the first three counts, appellant entered a plea of guilty to count five of the indictment, and the Government dismissed count four. No challenge to that plea, or to the sentence imposed thereunder, is made here. Accordingly, that portion of the judgment of conviction should be affirmed.

On October 13, 1967, appellant and Griffith stood trial before Judge Keech and a jury. They were found guilty. On December 15, 1967, Judge Keech sentenced appellant to imprisonment. A timely application for leave to appeal in forma pauperis was granted and the appeal from the judgment of conviction was docketed here as No. 21,816.

While the direct appeal was pending before this Court, appellant filed a motion for new trial in the District Court urging that newly discovered evidence tended to exonerate him. That motion came on for hearing on March 14, 1969 and was denied by an order filed March 20, 1969. A timely notice of appeal was filed and the appeal docketed here as No. 22,898.

By its order of April 14, 1969, this Court consolidated the two appeals for purposes of briefing and argument. The Court has jurisdiction pursuant to 28 U.S.C. §1291.

The Facts

A. The Trial (No. 21,816)

1. The Government's Case

At trial, the Government's principal witness was the victim, Morgan A. Sawyer. Sawyer testified that he was

a night clerk at the Jefferson House Apartments in Washington (Tr. ^{2/}3). On the night of January 21, 1967, Sawyer was on duty sorting tenant mail when "two men entered the entrance of the apartment house and came up to the desk and proceeded to rob me" (Tr. 4). Sawyer testified that the men walked to the counter where he was working whereupon one of the men, whom Sawyer identified as Griffith (Tr. 4-5), held a gun "under his jacket where all I saw was the barrel of it" (Tr. 5). The other man, whom Sawyer identified as appellant (Tr. 9), came behind the counter and said, "We want the money" (Tr. 8-9). The men took fifteen dollars, a billfold, a radio, a watch and a ring (Tr. 9-11).

The men took Sawyer to a back room (Tr. 10) and tied his hands and feet with a necktie and belt (Tr. 11). The robber whom Sawyer identified as appellant cut Sawyer's necktie for this purpose, saying "I ought to cut your throat" (Tr. 11). Before the robbers left, the same man told Sawyer, "We are going to leave and don't call the police. If you ever call the police, and if you ever identify us, we will

^{2/} The abbreviation "Tr." refers to the transcript of the trial. The abbreviation "S. Tr." refers to the supplemental trial transcript. The abbreviation "H. Tr." refers to the transcript of the hearing on appellant's motion for new trial.

come back and get you" (Tr. 11). The men left (Tr. 11).

On cross-examination, Sawyer testified that he had not noticed any particular "facial characteristics" on the robber whom he identified as appellant (Tr. 20). Alexander approached the witness stand and exhibited a facial scar and missing front teeth (Tr. 21). Sawyer stated that he had not noticed these characteristics (Tr. 22, 25-26). When defense counsel asked Sawyer if the man whom he identified as Alexander had not spoken to him, Sawyer answered "when he spoke, he did not open his mouth" (Tr. 22).

Prior to his redirect examination, the prosecutor approached the bench:

MR. WIESEMAN [the prosecutor]: Inasmuch as counsel have attacked validity of identification, at this time I propose in rebuttal to introduce prior identification, the description he gave the police. Counsel announced they were going to object to it.

THE COURT: I don't know what you gave before. You may ask what the description was that he gave.

MR. KANE [Griffith's counsel]: We object to that. We would object to a simple recitation of a prior consistent statement.

THE COURT: I do not know why. What is your rule?

MR. HALL [Griffith's co-counsel]: Could we confer with other counsel?

MR. MESIROW [Appellant's counsel]: A prior consistent statement is not admissible, am I correct? I am just trying to help my co-counsel.

THE COURT: I do not think we are talking about the same thing. Are you indicating you have a case where the complainant was robbed and could not say he gave a description to the police? That is all he is saying.

MR. WIESEMAN: I want him to say what the description was.

THE COURT: Let us deal with one thing at a time. You want to ask the man if he gave it and what it was. I see no reason at this point for utilizing the statement, and I am limiting you at this juncture to find out if this man knows the description he gave.

MR. WIESEMAN: I suspect the answer will be no. I don't think he can give it word for word. I would like to refresh his recollection. I know if he looks at it, he can say that is the description he gave.

THE COURT: Try one thing at a time.
(Tr. 23-24).

Sawyer then testified that he had given the police a contemporaneous description of the men who had robbed him (Tr. 24). He told the police that the robber whom he identified as Alexander was between 30 and 35 years of age, had lighter hair "more of a sandy color" and weighed about

155 to 160 pounds (Tr. 25).^{4/}

The Government's other witness was Detective Gilbert M. Silvia of the Metropolitan Police Department (Tr. 26). Silvia testified that he had arrested appellant and Griffith together in a downtown grill the day following the robbery (Tr. 27). Silvia searched the men upon their arrest. The prosecutor asked if he had found "anything which you have with you as a result of that search" (Tr. 27). Griffith's counsel objected and a lengthy bench colloquy ensued:

MR. KANE: I believe the Government is about to ask the witness whether or not the defendant had a gun at the time of his arrest. I would object to that testimony with reference to the gun. It has not even been shown to the victim as having been the gun used in the robbery.

MR. WIESEMAN: This is not any old gun. It is a gun without a cylinder, which is why the gun was held underneath the coat, so that

^{4/} Subsequently, at a bench conference, the prosecutor informed defense counsel that Sawyer's initial description of the robbers to the police had included a reference to their respective heights:

"I think on the description they were each about two inches taller than they actually are. You will find your man [Griffith] is described as five foot nine when in fact he is five foot seven. The other man [Alexander] is described as five foot six or something when in fact he is five feet ten" (Tr. 35).

only the barrell [sic] showed. This is a gun you can only show the barrel without the victim knowing it is a gun that cannot be fired.

* * *

I think the relevance of the gun is the jury can decide whether this is the same gun. The reason we want to put it up to the jury is this gun has no cylinder in the middle. If anyone looked at the whole gun, they would know the gun cannot be fired. The plaintiff testified the person in the yellow shirt never showed the whole gun. He was very careful to keep the gun under his coat."
(Tr. 28-29, 30-31).

During the bench conference, it developed that the victim was prepared to identify the barrel of the gun as "similar to that which was presented and used at the time of robbery" (Tr. 29), but that he thought "the sight looked larger" (Tr. 29-30). The trial judge sustained Griffith's objection on the ground that the proffered identification was inconsistent (Tr. 31).

Subsequently, when the prosecutor asked permission to recall the victim out of the presence of the jury and have him attempt to identify the gun, the trial judge said:

THE COURT: I take you at face value. You told me all he can do is identify a barrel that looks like it, but it is different in that the

sight is smaller than the barrel carrying the sight at the time of the robbery.

MR. WEISEMAN: He put it [to] me that it would look bigger when you are being robbed.

THE COURT: I think I will stick to what I have done, sir. There is no good in your winning a case if you make an error and I actually think I would have been disposed to admit it as to the barrel. That would go to the probative value, but when you have a conflict such as you have as to the sight, namely he accented the large part of the sight --
(Tr. 35).

The Government thereupon rested (Tr. 35). Appellant's trial counsel moved for a judgment of acquittal, specifically calling the trial court's attention to "a gross difference as far as identification [of Alexander] is concerned" (Tr. 35). The motion was denied (Tr. 36).

2. The Defense

The defense was alibi. Appellant testified that he had been released from Occoquan Work House on January 19, 1967 (Tr. 93-94). He telephoned his brother-in-law in Connecticut and arranged to have thirty dollars wired to him at a local Western Union office (Tr. 94). Appellant denied the offense (Tr. 94, 97), and testified that he was asleep in a local hotel at the time of the robbery (Tr. 97), staying with Kay

St. Clair a woman whom he had known for three years and with whom he had lived for a year and a half (Tr. 106-107).

A Western Union official confirmed that his records reflected a thirty dollar payment to appellant pursuant to telegraphed authorization (Tr. 109-111). The Government stipulated as to the efforts which trial counsel had made to locate Miss St. Clair (Tr. 114-115, 125-126). The defense rested (Tr. 126).

3. Closing Arguments, The Charge, Verdict and Sentence.

The closing arguments of counsel focused the jury's attention on the identification issue (S. Tr. 3-4, 13-14, 25-26, 27-29). The prosecutor accurately and candidly told the jury that identification was the issue in the case:

MR. WIESEMAN: Mr. Sawyer, the government's one witness, was alone that night. It was 3:15 in the morning. The government's one witness said the defendant Griffith had a pistol and defendant Alexander had a knife. There was no one else who can say that they are the people who did it. The question is whether you believe beyond a reasonable doubt the identification he makes, is his testimony correct.
(S. Tr. 3-4)

The Government argued that Sawyer's in-court identification was bolstered by his prior description to the police:

MR. WIESEMAN: You heard testimony about the description that he gave to the police at the time. You remember that these defendants fit the description right down to the letter except for the heights. One was a little bit too tall on the heights is a normal and natural mistake. (S. Tr. 5).

The prosecutor re-made the point in his rebuttal argument (S. Tr. 27).

Following the charge, the jury retired to deliberate. Thereafter, it returned to the courtroom and informed the court that it was "not able to arrive at a unanimous decision" (S. Tr. 30). With the consent of all counsel (S. Tr. 31), the court released the jury for the weekend. The following Monday morning, the jury found appellant guilty on all counts.

Following the trial, appellant withdrew his plea of not guilty to count five of the indictment, charging assault with a dangerous weapon and pleaded guilty. The Government dismissed count four. See supra, p. 2 n.1.

The District Court sentenced appellant to consecutive terms of imprisonment on each count. Thereafter, on defense motion, the sentence was amended to provide for

concurrent service of the sentences imposed on counts one to three, and consecutive service of the sentence imposed on count five.

B. Motion for New Trial (No. 22,898)

On January 21, 1969, appellant filed a motion for new trial contending that newly discovered evidence tended to exonerate him. Annexed to the motion were affidavits of George Brit Griffith and Raymond Brent.

The Griffith affidavit stated, in pertinent part:

"I am acquainted with Joseph Alexander, whom I know as "Pat" and I was a brother to Clyde Griffith, Alexander's co-defendent herein.

I was in the District of Columbia Jail at the time Clyde Griffith was there awaiting trial. I discussed with him the charges against him and Alexander relating to the holdup of the hotel clerk at the Jefferson House Apartments on January 21, 1967.

Clyde Griffith admitted to me that he had committed this holdup and was accompanied by one other person but that Joseph Alexander had nothing to do with the holdup and was innocent of the charges against him."
(Griffith Affidavit, pp. 1-2).

The Brent affidavit stated, in pertinent part:

"I am acquainted with Joseph Alexander, whom I know as "Pat", and I also knew Clyde Griffith, Alexander's co-defendant herein.

While Griffith was in the District of Columbia Jail awaiting trial, I had occasion [sic] to discuss the charges herein as they relate to the hold-up of the hotel clerk at the Jefferson House Apartments on January 21, 1967.

During these pre-trial conversations, Griffith repeatedly told me that Pat Alexander had not accompanied him (Griffith) on this occasion and that Alexander was innocent of this charge. Griffith admitted to me that he (Griffith) and David Heller had committed the holdup, and that they were assisted by Robert Fearon. He stated, however, that Alexander was not involved.

Griffith told me, again prior to trial, that following the hold-up at the Jefferson House, he (Griffith), Heller and Fearon returned to an apartment which they shared."
(Brent Affidavit, pp. 1-2).

The matter was set for hearing before Judge Keech. The day before the hearing, appellant served (H. Tr. 28) an unsworn statement from Robert F. Fearon in further support of the motion.^{5/} The Fearon statement recites, in pertinent part:

"In 1967, I was incarcerated at the District of Columbia Jail awaiting trial on a criminal

^{5/} The Fearon statement is not in the record on appeal in these cases. It is in the record in United States v. Alexander, No. 22,979. Following the remand in that case, Fearon's deposition was taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure. On deposition, Fearon swore that the statement was true. See Fearon Deposition, pp. 6-7, filed in United States v. Alexander, Crim. No. 329-67 (D.D.C.). For the Court's convenience, a copy of the Fearon deposition has been lodged with the Clerk of this Court. See infra p. 47.

charge. While at the jail, I had several conversations with Clyde Griffith whom I first met several years ago at Occoquan, Virginia. At the time of these conversations, Griffith was in jail awaiting trial on a charge of robbing the hotel clerk at the Jefferson House Apartments.

During these conversations, Griffith told me that he had in fact participated in the robbery at the Jefferson House Apartments but that Joseph Alexander, who was indicted with him for that offense, was not guilty. Instead, Griffith told me that he had been accompanied by David "Red" Heller, and that it was Heller, not Alexander, who was Griffith's accomplice on this job." (Fearon Statement, p. 1).

The matter came on for hearing before Judge Keech at which time appellant had all witnesses present (S. Tr. 2). As the Government resisted the motion on the ground that the proffered evidence was inadmissible hearsay, Judge Keech determined to first hear arguments of counsel on the legal issue of admissibility (S. Tr. 2-7). Following arguments, the Court rendered a short oral opinion stating:

"I have some doubt that the statement here was what could be characterized as against penal interest. But I shall assume for my determination that it is. But under my reading of the cases, I do not find it to be admissible under Donnelley, [6/] certainly in so far as applicable here. I am completely conscious that authors of great respect have dealt with the subject. There have been

6/ The reference is to Donnelly v. United States, 228 U.S. 243 (1913).

some Federal courts who have touched on the subject. But I find no Federal case which has overruled or attempted to overrule in fact and in law the Donnelley case. I feel, therefore, that I am controlled by the pronouncement of the Supreme Court of the United States, and I will, therefore, deny your motion for a new trial." (H. Tr. 36-37).

A formal order reciting the District Court's conclusions of law was entered on March 20, 1969. A timely notice of appeal was filed and the appeal docketed here as No. 22,898.

I

THE TRIAL COURT ERRONEOUSLY PERMITTED
THE GOVERNMENT TO ADDUCE EVIDENCE OF
A PRIOR DESCRIPTION BY ITS EYE WITNESS

The Government's entire case against appellant hinged on Sawyer's identification (S. Tr. 3-4, 6-7, 29). On direct examination, Sawyer positively identified both Griffith (Tr. 5) and appellant (Tr. 9). Sawyer emerged unshaken in that identification following a searching cross-examination (Tr. 15-22), although he did admit that he had failed to notice appellant's missing front teeth and facial scar (Tr. 20-22). The prosecutor then approached the bench, stated that "counsel have attacked [the] validity of [the] identification" (Tr. 23), and sought leave to introduce in rebuttal "the description [Sawyer] gave the police" (Tr. 23). Explicit objection was made on the ground, inter alia, that "a prior consistent statement is not admissible" (Tr. 23). The trial judge overruled the defense objections (Tr. 23-24), and Sawyer was permitted to testify as to the physical description of the robbers which he had given to the police. (Tr. 24-25).

This, we proceed to demonstrate, was error on two counts. In the first place, under the circumstances of this case, the

evidence was wholly inadmissible. Alternatively, however, even if admissible, the evidence was available only insofar as it bore on Sawyer's credibility -- it could not be used, as it was, as substantive evidence of appellant's guilt.

A. The Evidence Was Inadmissible

Generally speaking, evidence of a prior consistent statement is not admissible to bolster a witness' courtroom testimony. E.g., Ellicott v. Pearl, 10 Pet 412, 438 (1836) (Story, J.); Johnson v. United States, 121 U.S.App.D.C. 140, 369 F.2d 185, 191 (1966); United States v. Leggett, 312 F.2d 566 (4 Cir. 1962); IV Wigmore on Evidence § 1130 (3d ed. 1940); 3 Wharton's Criminal Evidence § 969 (12th ed. 1955).

The reason such evidence is generally inadmissible was cogently stated by a North Carolina judge a number of years ago:

"It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. * * * The idea that mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood [and, with Judge Hand, we would add mistake 7/] may be repeated as often as the truth." State v. Parish, 79 N.C. 610, 612 (1878).

7 / Di Carlo v. United States, 6 F.2d 364, 366 (2 Cir.), cert. denied, 268 U.S. 706 (1925).

See generally, Annot., Corroboration - Prior Consistent Statements, 140 A.L.R. 21 (1942), supplemented, 75 A.L.R.2d 909 (1961); IV Wigmore on Evidence §§ 1122-1133 (3d ed. 1940).

The exception which arises when a witness is accused of fabrication, ^{8/} or impeached by a prior inconsistent statement, ^{9/} is not available here. Defense counsel did not accuse Sawyer of lying, nor did he impeach Sawyer by a prior inconsistent statement. The cases hold that prior consistent statements do not become admissible merely because the witness has been cross-examined "upon the accuracy of his memory and the veracity of his testimony." United States v. Potash, 118 F.2d 54, 57 (2 Cir.) (L. Hand, J.), cert. denied, 313 U.S. 584 (1941); cf. United States v. Leggett, 312 F.2d 566 (4 Cir. 1962). See generally, IV Wigmore on Evidence § 1131 (3d ed. 1940).

We are aware "that the law with respect to the admissibility of prior consistent declarations in general has undergone

^{8/} E.g., Copes v. United States, 120 U.S.App.D.C. 234, 345 F.2d 723 (1964); Hanger v. United States, 398 F.2d 91, 102-105 (8 Cir. 1968); Di Carlo v. United States, 6 F.2d 364, 366 (2 Cir.) (L. Hand, J.), cert. denied, 268 U.S. 706 (1925).

^{9/} E.g., Copes v. United States, supra n. 8, 345 F.2d at 724; United States v. De Sisto, 329 F.2d 929, 932-934 (2 Cir.), cert. denied, 377 U.S. 979 (1964).

considerable liberalization in recent years." Copes v. United States, supra, 120 U.S.App.D.C. at 238, 345 F.2d at 727; United States v. De Sisto, 329 F.2d 929, 933 (2 Cir.), cert. denied, 377 U.S. 979 (1964). We have no quarrel with such cases -- indeed, we argue for just such a "liberalization" of another hearsay rule later in this brief. But here, where the sole purpose of the Government's use of such a statement was to bolster Sawyer's identification of appellant and Griffith, there is no need for further relaxation of the rule.

At one time, the rule barring prior consistent statements was so woodenly applied as to preclude a witness from testifying that he had made a fresh identification of the accused. E.g., People v. Seppi, 221 N.Y. 62, 116 N.E. 793, 795 (1917); People v. Jung Hing, 212 N.Y. 393, 106 N.E. 105 (1914). See generally, Annot., Extrajudicial Identification, 71 A.L.R.2d 449 (1960). Justice Traynor has convincingly demonstrated the unsoundness of such holdings, People v. Gould, 54 Cal.2d 621, 354 P.2d 865 (1960), and we do not suggest that testimony of a fresh identification would have been inadmissible under the rule barring prior consistent statements in this case -- either as part of the Government's case-in-chief or on rebuttal. Indeed, the error here is underscored by the very fact that evidence of a prior

fresh identification would have been admissible. E.g., Clemons v. United States, __U.S.App.D.C.__, 408 F.2d 1230, 1242-1243 (1968) (en banc); Eidson v. United States, 272 F.2d 684, 685-687 (7 Cir. 1959); United States v. Forzano, 190 F.2d 687 (2 Cir. 1951). Such evidence, as this Court recently made clear, is of such overriding importance to a jury called upon to resolve an issue of identity as to require departure from the evidentiary rule barring prior consistent statements. Clemons v. United States, supra, 408 F.2d at 1243; IV Wigmore on Evidence § 1130 (3d ed. 1940).

Sawyer did not testify, either on direct examination or on redirect examination, that he had identified appellant shortly after the offense when he would understandably have had a clearer memory of the events and before subtle suggestion might have colored his recollection. On this record, one can only speculate why, if such evidence was available, the Government elected not to use it. Perhaps Sawyer did identify appellant, but did so under circumstances which gave the Government constitutional reason to pause. Compare Tr. 109 with Stovall v. Denno, 388 U.S. 293 (1967); Clemons v. United States, supra. Cf. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Simmons v. United States, 390 U.S. 377

(1968).^{10/} But if the Constitution forbids receipt into evidence of an actual identification, there can be no sound reason to relax a rule of evidence and receive indirectly that which cannot otherwise be heard.

On the other hand, perhaps Sawyer viewed appellant in constitutionally safe circumstances but failed to identify him. But if that be the case, the error here leaves the realm of the law of evidence and rises to constitutional proportions. E.g., Brady v. Maryland, 373 U.S. 83 (1963); Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); Levin v. Clark, __U.S.App.D.C.__, 408 F.2d 1209 (1967).

Whatever the reason, the cases gave the Government a perfectly proper way to bring to the jury's attention the fact -- if it was the fact -- that Sawyer had previously identified appellant. For whatever reason, the Government chose not to adduce such testimony. Instead, over timely objection (Tr. 23), it sought to adduce evidence which, as we have shown, is inadmissible. Supra, pp. 17-19.

^{10/} The offense in this case took place in January of 1967; the trial in October, 1967. The record does not show the day on which Sawyer identified appellant. But see Tr. 109.

B. The Evidence, Even if Admissible, Was Misused

Even assuming arguendo that the evidence was admissible for the limited purpose of corroborating Sawyer's in-court identification, it was not substantive evidence to be considered on the issue of guilt. United States v. Schwartz, 390 F.2d 1, 3-4 (3 Cir. 1968); United States v. Crowder, 346 F.2d 1, 4 (6 Cir. 1964); Cafasso v. Pennsylvania R. Co., 169 F.2d 451 (3 Cir. 1948); Affronti v. United States, 145 F.2d 3 (8 Cir. 1944); Di Carlo v. United States, 6 F.2d 364, 365-367 (2 Cir.) (L. Hand, J.), cert. denied, 268 U.S. 706 (1925); cf. Coleman v. United States, 125 U.S.App.D.C. 246, 371 F.2d 343 (1966), cert. denied, 368 U.S. 945 (1967); Bartley v. United States, 115 U.S.App.D.C. 316, 319 F.2d 717 (1963); Wheeler v. United States, 93 U.S.App.D.C. 159, 211 F.2d 19, 27 (1953) (Fahy, J., dissenting), cert. denied, 347 U.S. 1019 (1954). Thus, the jury should have been carefully instructed on this limited purpose and the prosecutor should have refrained from using this evidence substantively in his jury argument. Neither occurred at the trial.

1. The Jury Should Have Been Instructed On
The Limited Purpose Of The Evidence

In Copes v. United States, supra, 120 U.S.App.D.C. at 238, 345 F.2d at 727, this Court left open the question whether a cautionary instruction is required when a prior consistent statement is received into evidence as corroborative evidence.^{11/} Should the Court disagree with our argument supra pp. 17-19, and hold the evidence properly admissible as corroborative evidence of Sawyer's courtroom identification, the question left unanswered in Copes must be faced here. For reasons which follow, we think such a cautionary instruction was required at the time the evidence was received.

^{11/} On the special circumstances present in the record, the Second Circuit admitted a prior consistent statement as substantive evidence in United States v. De Sisto, 329 F. 2d 929 (2 Cir.), cert. denied, 377 U.S. 979 (1964). Citing the De Sisto case, this Court left open the question whether, in some circumstances, evidence of prior consistent statements might be admissible as substantive evidence. Copes v. United States, supra, 120 U.S.App.D.C. at 238, 345 F.2d at 727. There is no occasion to reach that question here, for none of the special circumstances present in De Sisto are present here, and the Second Circuit has since made it clear that the evidence involved in this case is not admissible as substantive evidence on the issue of guilt. Taylor v. Baltimore & O. R. Co., 344 F.2d 281 (2 Cir. 1965); United States v. Nuccio, 373 F.2d 168, 172 (2 Cir. 1967). See Judge Sheridan's excellent analysis of the De Sisto principle, United States v. Schwartz, 390 F.2d 1, 3-5 (3 Cir. 1968).

Precisely because the prior consistent statement "is never evidence of the fact at issue, but has for its sole purpose the support of a witness whose veracity has been attacked, and is to be considered only as affecting the credibility of the witness, the jury [should be] carefully cautioned to this effect." 3 Wharton Criminal Evidence § 969 at p. 443 (12th ed., 1969 Cum Supp. at p. 80); McCormick on Evidence 73 (1954 ed.).

For precisely the same reasons that this Court has required such an instruction where the witness is confronted with a prior inconsistent statement, the Court should require the instruction in cases such as this where a prior consistent statement is introduced. Jones v. United States, __U.S.App.D.C.__, 385 F.2d 296 (1967); Coleman v. United States, 125 U.S.App.D.C. 246, 371 F.2d 343 (1966), cert. denied, 368 U.S. 945 (1967); Bartley v. United States, 115 U.S.App.D.C. 316, 319 F.2d 717 (1965). Thus while the Coleman-Bartley line of cases stems from the statutory requirement of 14 D.C. Code § 102 (1967), the need for a cautionary instruction is equally essential here where common law principles provide the same strictures on the use of evidence of prior consistent statements as is imposed by the statute with respect to prior inconsistent statements. Coleman v. United States, supra, 125 U.S.App.D.C. at 249 n.3, 371 F.2d at 346 n.3. Here,

the jury was instructed neither at the time the evidence was received, or later.

It is true, as the Government is sure to point out, that no specific request for a cautionary instruction was made. There are two reasons why such an argument cannot prevail. In the first place, a very explicit objection was made to the evidence on the ground that prior consistent statements are not admissible into evidence (Tr. 23). That objection was sufficient to call for a cautionary instruction in the event the judge decided to admit the evidence for the limited purpose of corroboration. Winchester & Partridge Mfg. Co. v. Creary, 116 U.S. 161, 166 (1885); United States v. Kelson, 205 F.2d 600, 601-602 (2 Cir. 1953) (Frank, J.). Particularly in view of the fact that this Court's holding in Coleman, supra,^{12/} was already on the books when this case was tried, the objection to admission of the evidence (Tr. 23) must be deemed to include the subsidiary request for appropriate limiting instructions in the event the objection was overruled.

^{12/} "From this day [July 14, 1966] forward, therefore, we read the statute as contemplating a ruling by the trial court which comprehends * * * an immediate representation to the jury as to the purpose for which the impeaching statements are being permitted to come in." 125 U.S.App.D.C. at 249, 371 F.2d at 346.

Moreover, as this Court held in Bartley v. United States, 115 U.S.App.D.C. 316, 319 F.2d 717 (1963) and Jones v. United States, 128 U.S.App.D.C. 36, 385 F.2d 296 (1967), the failure to give such a limiting instruction can be plain error within the meaning of Rule 52, F.R.Crim.P. Particularly in this case where objection to the evidence was clearly articulated (Tr. 23), and where, as we show infra pp.28-30, the risk of prejudice is high, trial counsel's failure to ask for a limiting instruction should not bar consideration of the error.

2. The Prosecutor Misused the Evidence

Closely related to the need for a cautionary instruction is the prosecutor's obligation to scrupulously guard against misuse of the corroborative evidence in summation. As this Court has said:

"There is always the possibility that the prosecutor, by accident if not by design, will be imprecise in his characterizations of the impeaching statements. Unless there has been a warning at the time the statements come in, the jury will have no intimation that it should treat the statements differently from other evidence. To be told this by the court for the first time after the prosecutor's argument may, as a practical matter, be too late." Coleman v. United States, 125 U.S.App.D.C. at 249 n.3, 371 F.2d at 346 n.3.

Here, "by accident if not by design," the prosecutor misused

the evidence in his summation.

The prosecutor carefully and correctly told the jury that the issue before it "is whether you believe beyond a reasonable doubt the identification [Sawyer] makes, is his testimony correct." (S. Tr. 3-4). He then marshalled the various arguments which he urged the jury to consider in evaluating Sawyer's testimony (S. Tr. 4-5). This was perfectly appropriate advocacy. But having done this, the prosecutor, "by accident" we are sure, turned the corner and misused the evidence under challenge here.

Having completed his argument on Sawyer's testimony, the prosecutor said:

"All that Mr. Sawyer can do is to tell you as he told you that he is positive that these are the men. The defendants suggest that he was mistaken. Well, you heard the government's case. We do not have very much else beside Mr. Sawyer. That is really our case, just a few things.

* * *

You heard testimony about the description that he gave to the police at the time. You remember that these defendants fit the description right down to the letter except for the heights. One was a little bit too tall on the heights is a normal and natural mistake." (S. Tr. 5). 13/

13/ The point was hammered home on rebuttal when the prosecutor told the jury "with the kind of description he gave, these people just happened to fit it when he says they were the people who robbed him?" (S. Tr. 27).

Of course, as we have earlier demonstrated, the Government had nothing else beside Mr. Sawyer, for the challenged evidence went only to his credibility -- it was not substantive evidence to be considered by the jury. Just as the prosecutor may not argue from evidence not admitted, Reichert v. United States, 123 U.S.App.D.C. 294, 359 F.2d 278 (1966), he may not argue substantively from evidence admissible, if at all, for the limited purpose of impeachment or corroboration. Wheeler v. United States, 93 U.S.App.D.C. 159, 211 F.2d 19, 26 (1953), cert. denied, 354 U.S. 1019 (1954).

Here, as contrasted with Wheeler v. United States, supra, the total absence of a jury instruction compounds the prejudice engendered when the prosecutor -- no doubt in good faith reliance on the trial court's erroneous ruling on admissibility -- argued the evidence substantively to the jury.

C. Reversal Is Required

We recognize that not every erroneous admission of a prior consistent statement calls for reversal. Williams v. United States, 119 U.S.App.D.C. 190, 338 F.2d 530 (1964); Baber v. United States, 116 U.S.App.D.C. 358, 324 F.2d 390 (1963); Copes v. United States, 120 U.S.App.D.C. 234, 345 F.2d 723 (1964). Here, however, reversal is required.

This is not a case where the evidence is "strong and ample." Baber v. United States, supra, 116 U.S.App.D.C. at 324 F.2d at 394. Rather, the Government's whole case hinged -- solely and entirely -- on the eye witness testimony of a single man. One need only peruse Judge Frank's collection of cases where innocent persons have been convicted on the good faith, but erroneous, identification testimony of eye witnesses to appreciate the risks of such convictions. Frank, Not Guilty (1957). See, United States v. Wade, 388 U.S. 218, 228 (1967). Yet the Court need not stop there, for there is more. Here, the sole witness failed to observe two extraordinarily prominent facial characteristics -- a scar and missing front teeth -- on the very man he says was bending near and speaking to him (Tr.20-23). He misjudged appellant's height significantly even though, as he testified at trial, he carefully sized up the robber against his own height of just over six feet (Tr. 13, H.Tr. 34).

If more be needed, we point to the fact that the jury initially reported to the Court that it was "not able to arrive at a unanimous decision" (S. Tr. 30). Surely, this is not a case where evidentiary error on the "nerve center"^{14/} issue of identity

^{14/} King v. United States, 125 U.S.App.D.C. 318, 372 F.2d 383, 395 (1967).

can be dismissed as harmless. Rather, to use Judge McGowan's chilling phrase, this is a case raising the "spectre of the conviction of an innocent person." Coleman v. United States, supra, 125 U.S.App.D.C. at 248, 371 F.2d at 345. See infra, pp. 34-47.

Reversal is required in order that a jury may decide whether Sawyer's identification convinces them of appellant's guilt beyond a reasonable doubt, either without any evidence of his description of the robbers to police officers or with such evidence admitted under careful instructions and then solely for whatever corroborative value the jury may attribute to it.

II

THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION ON COUNT TWO

In count two of the indictment, appellant is charged as an aider and abettor (Tr. 135-137) in Griffith's alleged assault with a dangerous weapon on witness Sawyer. The Government carefully adduced evidence to show that Griffith had hidden the body of the gun beneath his coat, showing only the barrel to Sawyer (Tr. 5, 8). It then attempted to adduce evidence that, when arrested, Griffith had a gun in his possession (Tr. 27). Griffith's attorney objected (Tr. 28), and a bench colloquy followed where the Government offered to prove that the gun taken from Griffith by police officers was broken and only the barrel could be exposed before this fact became obvious (Tr. 28). The Government also offered to prove that Sawyer would identify the barrel of the gun as being similar to the gun he saw Griffith point at him, but that he recalled the sight as being larger (Tr. 29-30).

The trial judge sustained Griffith's objection to receipt into evidence of this gun on the ground that it had

been insufficiently identified (Tr. 31). The court erred, for the gun was clearly admissible. E.g., Morton v. United States, 87 App.D.C. 135, 183 F.2d 844 (1950); Yates v. United States, 362 F.2d 578 (10 Cir. 1966); People v. De Pompeis, 410 Ill. 587, 102 N.E.2d 813, 817 (1952), cert. denied, 346 U.S. 904 (1953); Ives v. Commonwealth, 184 Va. 877, 36 S.E.2d 904 (1946); Wortham v. State, 134 Tex. Cr. 626, 115 S.W.2d 650 (1938). See generally 1 Wharton's Criminal Evidence, § 203 (12th ed. 1955).

Had the court properly admitted the gun into evidence, it would have been obliged to acquit appellant on count two of the indictment. In the absence of evidence that it was used as a bludgeon or in some other dangerous fashion, a broken gun is not a dangerous weapon. People v. Vaiza, 244 Cal. App.2d 121, 52 Cal. Rptr. 733 (1966); cf. Price v. United States, 156 Fed. 950, 952 (9 Cir. 1907) (unloaded gun). Here, not only did the Government fail to prove a dangerous use of the broken gun, it affirmatively proved a non-dangerous use. Its evidence affirmatively showed that all Griffith did was point the barrel of a broken gun incapable of being fired. There is accordingly no evidence at all to sustain appellant's conviction on count two. Thompson v. City of Louisville, 362 U.S. 199 (1960).

This failure of proof was not called to the trial court's attention, but we think it plain that this Court should nevertheless consider the matter under the mandate of Rule 52(a), F.R.Crim.P. After all, had the matter been raised below, the court would have been obliged to acquit. And where, as here, the error is both plain and seriously affects substantial constitutional rights,^{15/} this Court should act.^{16/}

^{15/} Conviction of a crime on no evidence is a violation of due process of law. Thompson v. City of Louisville, supra.

^{16/} The fact that appellant received a concurrent sentence does not bar appellate review. Benton v. Maryland, 395 U.S. 784, 787-793 (1969). Here, the record shows that the trial court severely sentenced appellant, initially imposing consecutive sentences on each count. Obviously, there is a reasonable likelihood of a reduction of sentence if one count charging assault with a dangerous weapon is eliminated. Moreover, removal of this charge will be of plain aid in appellant's effort to gain parole. See Benton v. Maryland, supra, 395 U.S. at 792-793.

III

APPELLANT'S PROFFERED EVIDENCE IS ADMISSIBLE AND ENTITLED HIM TO A NEW TRIAL

In support of his motion for new trial, appellant submitted affidavits and statements from three witnesses. Each of these stated that co-defendant Griffith, now deceased, had admitted to them that he had committed the offense but that Alexander had not assisted him. Instead, two of the witnesses stated that Griffith had identified the real culprit as David "Red" Heller. Each of the witnesses further stated that at the time Griffith made these damaging statements he was in custody, under indictment and awaiting trial for this very offense. The District Court quite properly assumed that these statements were against Griffith's penal interest (App. at 1, 2-3), but held as a matter of law that such statements are inadmissible in a federal court (App. at 3). The court further held the statements inadmissible over appellant's contention that they constituted declarations against Griffith's pecuniary interest (H. Tr. 15-17; App. at 3). We proceed to demonstrate that the statements are admissible on either theory, and as admissible evidence entitle defendant to a new trial.

A. Griffith's Statements are Admissible

It is true that appellant's proffered evidence is hearsay, i.e., it is "testimony in court * * * of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value on the credibility of the out-of-court asserter." McCormick on Evidence § 225 at p. 460 (1954 ed.). Its admissibility, under usual formulations,^{17/} turns on the availability of a recognized exception to the

^{17/} Disenchanted with the rigidity with which the common law exceptions to the hearsay rule are often applied, and mindful that the rationale for any hearsay exception is the stamp of reliability provided by the circumstances under which a statement was uttered, scholars, judges and occasionally a court have urged a single test whereby reliability would be the touchstone. E.g., Dallas County v. Commercial Assurance Co., 286 F.2d 388 (5 Cir. 1961); V Wigmore on Evidence §§ 1427, 1476 (3d ed. 1940); McCormick on Evidence §§ 300-305 (1954 ed.); Smith, The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise, 54 A.B.A.J. 231, 235 (1968); Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, 3 N.Y. City Bar Ass'n Lectures on Legal Topics 99 (1926); Maguire, Common Sense and Common Law 146-147 (1947). The decisions in this Circuit seem to us to trend in that direction. E.g., United States v. Kearney, No. 22,411 (decided August 15, 1969); Gichner v. Troiano Tile & Marble Co., U.S.App.D.C. , 410 F.2d 238, 243 n.5 (1969); KLM v. Tuller, 110 U.S.App.D.C. 282, 292 F.2d 775, 782-784, cert. denied, 368 U.S. 921 (1961). For that reason, we expressly urged below the intrinsic reliability of the statement as an independent ground of admissibility (Deft's Reply at 1 n.1). We reiterate that ground here.

rule barring hearsay. Here, we submit, Griffith's statements were so clearly against his interest, both penal and pecuniary, as to make plain their admissibility.

1. Declaration Against Penal Interest

When Griffith made the statements, he was in jail awaiting trial after an indictment had been returned. The statements, wherein he admitted his own guilt and asserted appellant's innocence were so decidedly against his interest as to provide all the indicia of reliability which undergird all hearsay exceptions.^{18/} Under the circumstances of this case, it is so unlikely that Griffith would have lied and thereby subjected himself to many years in prison that the statement may be relied upon to a high degree. In Mr. Justice Holmes' words, "[it] would have a very strong tendency to make anyone outside of a court of justice believe that [appellant] did not commit the crime." Donnelly v. United

^{18/} The entire statement, including the exoneration of appellant, is against Griffith's penal interest for one could scarcely know that he was innocent and another guilty unless he had participated in the criminal enterprise. And one may inculcate himself just as surely by admitting facts known only to the culprit as by a direct declaration of guilt. E.g., Delbridge v. United States, 104 U.S.App.D.C. 399, 262 F.2d 710 (1958).

States, 228 U.S. 243, 277 (1913) (dissenting opinion). Thus, as a matter of fact, it seems perfectly plain that the statements were against Griffith's penal interest.

Strangely, although the common law has long recognized that a statement against one's interest is unlikely to be made unless it is true and therefore is sufficiently trustworthy to warrant an exception to the hearsay rule, declarations against one's penal interest have stood on somewhat different ground. The historical reason is the ipse dixit of Lord Lyndhurst in The Sussex Peerage, 11 Cl. & F. 109 (1844). There, without discussing earlier English cases holding otherwise,^{19/} the House of Lords held inadmissible a declaration by a clergyman that he had performed a marriage, an act then subject to criminal prosecution. The Sussex case announced that, in order to overcome a hearsay objection, the statement must be shown to be against the declarant's pecuniary or proprietary interest.

For a while, the rule found support in this country and a number of courts woodenly rejected proffered declarations

^{19/} See generally V Wigmore on Evidence § 1476 at p. 283 n.8 (3d ed. 1940).

against penal interest -- not because they were any less reliable than a declaration against pecuniary or proprietary interest, but because Lord Lyndhurst had said they were inadmissible. Reilley v. State, 14 Ind. 217 (1860) ("it would seem to be the dictate of natural reason [to admit such declarations], but the authorities are otherwise"); People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892). Such was the state of the law when the issue reached the Supreme Court of the United States in 1913. In Donnelly v. United States, 228 U.S. 243 (1913), the Court held a proffered declaration against penal interest inadmissible in a federal criminal case. The District Judge, placing express reliance on that case and observing that it has not been expressly overruled (App. at 3-4), held our proffered statement inadmissible.

While we recognize that Donnelly is still on the books, there are several reasons why that case does not bar receipt of Griffith's statements here. In the first place, this case may be distinguished from Donnelly. Here, Griffith was actually in jail under indictment and awaiting trial when the damaging statements were made. By contrast, the declarant in Donnelly was not in custody, had not been indicted and was not even under suspicion. Obviously, it is decidedly more

against one's penal interest to admit involvement in a crime when the threat of prosecution and imprisonment is both real and imminent and the trial date is drawing near. Thus, the Donnelly holding does not bear a determination that this statement is admissible.

More importantly, Donnelly was decided by a sharply divided Court, and the dissent of Mr. Justice Holmes, joined by Justices Lurton and Hughes,^{20/} has had the support of the scholars and courts, both state and federal. Declarations against penal interest are routinely held admissible in a number of state courts. E.g., People v. Spriggs, 60 Cal.2d 868, 389 P.2d 377 (1964) (Traynor, J.);^{21/} Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 289 (1945); Moore v. Metropolitan Life Ins. Co., 237 S.W.2d 210 (Mo. App. 1951); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923); Brennan v.

^{20/} Mr. Justice Van Devanter did not join the Court's opinion although he concurred in the result. 228 U.S. at 277.

^{21/} In Spriggs, the California Supreme Court expressly overruled People v. Hall, 94 Cal. 595, 30 Pac 7 (1892), a case which the Supreme Court had cited extensively in Donnelly as supportive of its holding that, on the facts there presented, the declaration was not admissible. 228 U.S. at 274-275.

State, 151 Md. 265, 134 Atl. 148 (1926); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946); People v. Lettrich, 413 Ill. 172, 103 N.E.2d 488 (1952); McClain v. Anderson Free Press 232 S.C. 488, 102 S.E.2d 750, 760 (1958); In re Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19, 25 n.3 (1946) (dictum).

All of the scholars support the admission of such statements and Dean Wigmore has called the Donnelly rule "an intellectual disgrace to our system of Evidence." V Wigmore on Evidence § 1476 at p. 284 (3d ed. 1940); McCormick on Evidence § 255 (1954 ed.); Jefferson, Declarations Against Interest, 5 Vand. L. Rev. 451 (1952); Comment, 31 N.Y.U. L. Rev. 1100, 1122 (1955).

Both the Model Code of Evidence^{22/} and the Uniform Rules of Evidence^{23/} favor admissibility. Indeed, Congress has provided by statute that such declarations are admissible in the District Court for the Canal Zone^{24/} and the recently promulgated preliminary draft of proposed

^{22/} Rule 509(1) (1942). See Peters v. United States, 408 F.2d 719, 724-725 (Ct. Cl. 1969).

^{23/} Rule 63(10) (1965).

^{24/} Ch. 109, Sec. 2962(10), Canal Zone Code, 76A Stat. 393 (1962).

Rules of Evidence for the United States District Courts
and Magistrates comes out four-square for admissibility.^{25/}

As all of these authorities make very clear, there is absolutely no reason save the historical accident of Sussex and its progeny such as Donnelly to exclude such statements. There is every reason, both in logic and simple justice, to admit them.

Insofar as we are aware, this Court has never ruled on the admissibility of such statements although, as Judge Wright recently observed, "a declaration [against interest] is one of a series of traditional exceptions to the hearsay rule * * * well recognized in this jurisdiction." Gichner v. Antonio Troiano Tile & Marble Co., supra, 410 F.2d at 241. In a jurisdiction which recognizes that a statement which "threatens the loss of employment, or reduces the chances of future employment, or entails possible civil liability" as sufficiently reliable as to warrant exception to the hearsay rule, 410 F.2d at 242, we submit that there is no basis for excluding a statement which threatens loss

^{25/} Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Rules of Evidence for the United States District Courts and Magistrates, Rule 8-04(b)(4), and comment, pp. 213-214 (Prelim. Draft, March 1969).

of liberty or life in a criminal prosecution.

In the federal courts, "the admissibility of evidence * * * [is] governed * * * by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 26, F.R.Crim.P. We think that command is sufficient warrant for this Court to consider the admissibility issue unencumbered by language in a 1913 Supreme Court case.^{26/} Indeed, this Court has not heretofore considered itself fettered by an early and erroneous Supreme Court decision on an evidentiary issue. See Wabinsky v. D.C. Transit System, Inc., 114 U.S. App.D.C. 22, 309 F.2d 317 (1962), where the Court upheld admissibility of a statement under the excited utterance

^{26/} Contra, Scolari v. United States, 406 F.2d 563 (9 Cir.), cert. denied, 395 U.S. 981 (1969). Significantly, the Solicitor General argued that, notwithstanding the Ninth Circuit's opinion, the Scolari case did not present "an appropriate vehicle" for reexamination of Donnelly since there was an issue as to the availability of the declarant. Brief for the United States in Opposition, pp. 6-7, 8, Scolari v. United States, Misc. No. 1518 (Oct. T. 1968). The Solicitor General did concede, however, that "the declaration against penal interest in Donnelly met the conditions which have been offered as a rationale for exceptions to the hearsay rule: the deceased declarant was clearly unavailable as a witness and the statement carried circumstantial probability of trustworthiness." Id., at 6-7. So here.

exception to the hearsay rule notwithstanding an 1886 Supreme Court case to the contrary.

"But even assuming that the 'federal rule' is that the evidence described in the motion for a new trial would be [in]admissible, it does not follow that it must also be the rule for the District of Columbia." Griffin v. United States, 336 U.S. 704, 712 (1949).

This Court's broad power to promulgate rules of evidence for the District of Columbia "so long as the rules chosen do not offend statutory or constitutional limitations", 336 U.S. at 714, is sufficient to consider the issue afresh, notwithstanding Donnelly.

As Justice Traynor has pointed out, a refusal to admit declarations against penal interest as part of the broader declaration against interest exception "now rests only on the historical accident of the Sussex case." People v. Spriggs, supra, 389 P.2d at 378. There ought to be a better reason before a man is barred from introducing evidence showing him to be innocent of a criminal charge.

2. Declaration Against Pecuniary Interest

Even if this Court holds that declarations against penal

interest are inadmissible, Griffith's declarations are nevertheless admissible. We specifically urged below (H. Tr. 15-17), and the District Court explicitly passed on (App. at 3), the declaration against pecuniary interest exception recognized by such cases as Gichner v. Troiano Tile & Marble Co., __U.S.App.D.C.__, 410 F.2d 238 (1969). Under Gichner, a statement which provides a basis for "the possibility of civil liability against [the declarant]" is admissible. 410 F.2d at 242. Here, Griffith's statement clearly provided a basis for liability to Sawyer for the torts of assault and conversion. Hence, it was a declaration against Griffith's pecuniary interest and admissible on that independent basis as well. Gichner so holds.

B. A New Trial is Required

In the event the Court holds the proffered testimony of Griffith, Brent and Fearon admissible as declarations against penal and/or pecuniary interest, this case should be remanded now with instructions to afford appellant a new trial.

There can be no serious contention that this evidence is not "material to the issues involved," nor has the Government

contended that the evidence was not "discovered since the trial" or that appellant was not "diligent in the attempt to procure the newly discovered." Thompson v. United States, 88 U.S.App.D.C. 235, 188 F.2d 652, 653 (1951).^{27/} Accordingly, we turn to show that the evidence is not "merely cumulative or impeaching" and that it is of "such nature that in a new trial it would probably produce an acquittal." Thompson v. United States, supra.

It is true that appellant's proffered evidence if admissible and believed, shows that Sawyer erred in his identification of appellant. In that sense, the evidence is "impeaching." But, contrary to the Government's argument below (H. Tr. 29-30), such evidence does indeed entitle appellant to a new trial. Delbridge v. United States, 104 U.S.App.D.C. 399, 262 F.2d 710 (1958), Arbuckle v. United States, 70 U.S.App.D.C. 282, 146 F.2d 657 (1944), and Coates v. United States, 84 U.S.App.D.C. 359, 174 F.2d 959 (1949), squarely so hold. This is not a case, such as Thompson v. United States, supra, where the newly discovered evidence con-

^{27/} The affidavit of appellant's trial counsel, Allen M. Meiserow, Esq., stands uncontradicted on the record.

sisted of an after-trial discovery that the prosecution witness had a criminal record which could have been introduced at trial as bearing on credibility. Rather, it is a case such as Delbridge, Arbuckle and Coates where the newly discovered evidence seriously undermines the testimony of the Government's only witness. Such evidence cannot be disregarded as "merely impeaching."

We have already demonstrated, supra pp. 27-29, that the Government's case against appellant stands solely on the eye-witness identification of a single witness. That identification, already open to serious question (Tr. 20-23), created a difficult issue for the jury's resolution as witnessed by its initial report that it was unable to agree on a verdict (S. Tr. 30). Evidence that the admittedly guilty co-defendant exonerated defendant and inculpated another is obviously evidence that "might very well have raised a reasonable doubt with the jury as to the defendant's guilt." Coates v. United States, supra, 174 F.2d at 960.

On such a record, we submit that appellant's entitlement to a new trial is a matter of law to be resolved by this Court. Delbridge v. United States, 104 U.S.App.D.C. 399, 262 F.2d

710 (1958); Arbuckle v. United States, 79 U.S.App.D.C. 282
146 F.2d 657 (1944); Coates v. United States, 84 U.S.App.D.C.
359, 174 F.2d 959 (1949); Mejia v. United States, 291 F.2d
198 (9 Cir. 1961); cf. Hamilton v. United States, 78 U.S.App.
D.C. 316, 140 F.2d 679 (1944).^{28/} The credibility of
appellant's proffered witnesses is for a jury. E.g.,
Mesarosh v. United States, 352 U.S. 1, 12 (1956); Delbridge
v. United States, supra, 262 F.2d at 712; Arbuckle v. United
States, supra, 146 F.2d at 660; Coates v. United States,
supra, 174 F.2d at 960. A jury should be permitted to weigh
Sawyer's eye-witness identification, with all its dis-
crepancies, against the exoneration of appellant by an
admittedly guilty participant.

^{28/} There is no need to order a remand to ascertain whether
the witnesses will testify as represented in their affidavits,
the course followed in Coates v. United States, supra.
Following this Court's remand order in an earlier phase of
this litigation (United States v. Alexander, No. 22,979, order
of May 8, 1969), the deposition of Fearon was taken with full
opportunity for the Government to cross-examine. That
deposition, now in the files of the District Court, shows
beyond doubt that Fearon will so testify. For the Court's
convenience, a copy of the Fearon deposition has been lodged
with the Clerk. Accordingly, as in Coates, the Court should
proceed to direct that a new trial be granted.

Conclusion

By reason of the foregoing, the judgment of conviction on count five should be affirmed; the judgment of conviction on the remaining counts should be reversed, a judgment of acquittal should be ordered on count two, and the case remanded with instructions to afford appellant a new trial on counts one and three.

Respectfully submitted,

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APPENDIX

Oral Opinion of the District Court

THE COURT: I have doubt that the statement here was what could be characterized as against penal interest. But I shall assume for my determination that it is. But under my reading of the cases, I do not find it to be admissible under Donnelley, certainly in so far as applicable here. I am completely conscious that authors of great respect have dealt with the subject. There have been State courts that have dealt with the subject. There have been some Federal courts who have touched on the subject. But I find no Federal case which has overruled or attempted to overrule in fact and in law the Donnelley case. I feel, therefore, that I am controlled by the pronouncement of the Supreme Court of the United States, and I will, therefore, deny your motion for a new trial. (H. Tr. 36-37).

Order Denying Motion for New Trial

[caption omitted]

ORDER

This matter came before the Court on defendant's motion for a new trial based on newly discovered evidence, and the Court reserved decision on defendant's request for an evidentiary hearing pending a determination of the admissibility of the proffered evidence for which purpose the Court assumed that co-defendant, Clyde Griffith, now deceased, made the statements as alleged in the affidavits of Raymond Brent and George B. Griffith annexed as exhibits to defendant's motion; and the Court having considered said motion and affidavits, the Government's written opposition thereto, defendant's reply, and the argument of counsel in open court at a hearing held March 14, 1969, the Court makes the following conclusions of law:

1. The Court has some doubt that the proffered evidence constitutes a declaration against the penal interest of co-defendant Clyde C. Griffith, now deceased, but assuming that the proffered evidence is a declaration

against Griffith's penal interest, such evidence would be inadmissible in a federal court under Donnelly v. United States, 228 U.S. 243, 272 (1913).

2. The Court has not been made aware of any case which specifically overrules Donnelly and therefore holds that Donnelly is controlling as to the admissibility of the proffered statements herein.

3. The Court further holds that the proffered statements would not be admissible as a declaration against Griffith's pecuniary interest.

4. Therefore this evidence would not qualify as newly discovered evidence since it would not have been admissible at the original trial and would be excluded from any new trial, if granted.

5. There is accordingly no reason to hold an evidentiary hearing.

WHEREFORE, it is by the Court this 20th day of March, 1969,

ORDERED that defendant's motion for new trial based

on newly discovered evidence be, and the same hereby
is, denied.

/s/ R. B. Keech

United States District Judge

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,816
22,898

JOSEPH ALEXANDER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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v.

JOSEPH ALEXANDER, Appellant.

Appeals from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1970

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REPLY BRIEF FOR APPELLANT

Preliminary Statement

With respect to the issues raised in Points I and III
of appellant's brief, we are content to rely on the argument

and analysis set forth therein. We limit our reply to the arguments advanced by the Government with respect to Point II.

Argument

The Government says that appellant's conviction for assault with a dangerous weapon should be sustained notwithstanding "the fact the robbery gun might not have been operable" (Gov't Br. at 8). This conclusion rests, as we proceed to demonstrate, both on a misreading of the record and a misunderstanding of the law.

1. Contrary to the Government's suggestion, appellant did not object "to admission into evidence of a cylinderless gun found upon Griffith at time of arrest" (Gov't Br. at 8). It was Griffith who objected (Tr. 28). Appellant took no position in the ensuing argument between Griffith's counsel and the prosecutor (Tr. 28-31), following which the trial judge sustained Griffith's objection and excluded the gun (Tr. 31). Thus, it is not correct to suggest, as the Government does (Gov't Br. at 8), that appellant is changing his position on appeal.

2. At trial, the prosecutor argued at length -- and we think correctly -- that the gun was admissible (Tr. 28-31). Given evidence that Griffith had carefully concealed the barrel of the gun from his victim (Tr. 5, 8, 11-12, 19), and that a cylinderless gun was found in Griffith's pocket the next day (Tr. 27-28), the Government's trial attorney correctly argued:

"This is not any old gun. It is a gun without a cylinder, which is why the gun was held underneath the coat, so that only the barrell [sic] showed. This is a gun you can only show the barrel without the victim knowing it is a gun that cannot be fired"(Tr. 28).

The Government's new position in this Court (Gov't Br. at 9) cannot survive record analysis, for with the gun in evidence, the conclusion that it was the gun held by Griffith is not only permissible under the holding of Yates v. United States, 362 F.2d 578 (10 Cir. 1966), it is compelling.

3. Once it be assumed that the inoperable gun was the gun used by Griffith, appellant's conviction for assault with a dangerous weapon cannot stand.^{1/} The Government misappre-

^{1/} Appellant's conviction rests on an aider and abettor theory. 22 D.C. Code § 105 (1967).

hends the law when it argues that an inoperable pistol is nevertheless a dangerous weapon with the meaning of 22 D.C. Code § 502 (1967). Three lines of cases must be carefully distinguished:

A. First, virtually any solid instrument can be a dangerous weapon if used as a club or a bludgeon. Greenfield v. United States, 119 U.S.App.D.C. 278, 341 F.2d 411 (1964)(soda bottle). Thus, if there were any evidence from which the jury could conclude that this inoperable gun was used as a club, a factual issue would be presented. But the Government's appellate conjecture that Griffith might have used the gun in such a manner (Gov't Br. at 9) cannot substitute for evidence that he did so, or at least threatened to do so. The record is otherwise (Tr. 5, 8). Presumably, anyone possessed of a solid instrument might use it as a bludgeon just as anyone wearing shoes might kick another person with them. Medlin v. United States, 93 U.S. App.D.C. 64, 207 F.2d 33, cert. denied, 347 U.S. 905 (1953). But that possibility cannot constitute the aggravated felony created by Congress in § 502 in the absence of evidence that he either did so, or at the least threatened to do so. See

People v. Vaiza, 244 Cal.App.2d 733, 52 Cal. Rptr. 733, 735 (1966); Lee v. State, 27 Ariz. 52, 229 Pac. 939, 942-943 (1924).

B. Also to be distinguished are the robbery cases. We do not argue that the "putting in fear" element of robbery fails because the weapon employed is shown to have been inoperable, unloaded or even non-existent (as for example, when the robber threateningly points his finger inside his coat pocket, or holds a phial of water which he claims to be nitroglycerine). The victim, as the Government properly points out, is just as afraid when, unknown to him, a broken gun is aimed at him as he is when the gun is loaded and in working order. This distinction is the basis for the holdings in People v. Ash, 88 Cal.App.2d 818, 199 P.2d 711 (1948), Hayes v. State, 211 Md. 111, 126 A.2d 576 (1956), State v. Montana, 69 N.M. 332, 367 P.2d 95 (1961) and Turner v. State, 300 S.W.2d 920 (Tenn. 1957) on which the Government places principal reliance (Gov't Br. at 9-10 and n.9). All were robbery -- not assault with a dangerous weapon -- cases. The Ash and Hayes courts carefully drew this distinction (199 P.2d at 717-718; 126 A.2d

at 578), while the Montana and Turner holdings turn on constructions of state robbery statutes which had been judicially construed not to require proof that a gun was loaded (367 P.2d at 96; ^{2/} 300 S.W.2d at 921). Compare Cooper v. State, 297 S.W.2d 75 (Tenn. 1957), which holds that a toy gun is not a dangerous weapon under Tennessee's aggravated robbery statute.

C. When dealing with the crime of assault with a dangerous weapon, the holdings are uniformly otherwise. All the cases hold that an unloaded gun is not a dangerous weapon. E.g., People v. Wood, 10 A.D.2d 231, 199 N.Y.S.2d 342, 345 (1960); State v. Lewis, 89 Ohio L. Abs. 441, 186 N.E.2d 487 (1962); Hobbs v. State, 363 P.2d 357 (Alaska, 1961); State v. Bush, 50 Idaho 166, 295 Pac. 432, 434 (1930); Lee v. State, 27 Ariz. 52, 229 Pac. 939, 942-943 (1924); Territory v. Gomez, 14 Ariz. 139, 125 Pac. 702, 703 (1912); People v. Bennett, 37 Cal.2d 327, 173 Pac. 1004, 1005 (1918);

^{2/} The New Mexico Supreme Court cited its earlier opinion in Territory v. Gonzales, 14 N.M. 31, 89 Pac. 250 (1907), where it approved a trial court's instruction in an assault with a dangerous weapon case which required a finding that the gun be loaded. 89 Pac. at 251, 252.

Price v. United States, 156 Fed. 950 (9 Cir. 1907).^{3/} See generally, Annot, Unloaded Gun - Criminal Responsibility, 79 A.L.R.2d 1412, 1423-1426 (1961).^{4/} A fortiori, a gun incapable of being fired, just as a toy gun, is not a dangerous weapon within the meaning of the assault with a dangerous weapon statute. People v. Vaiza, 244 Cal.App.2d 121, 52 Cal. Rptr. 733 (1966).

^{3/} Some of these cases make proof that the gun was unloaded a matter of defense.

If, and when, the question arises, this Court might well adopt such a rule. See Randall v. United States, 215 F.2d 587, 589-590 (9 Cir. 1954); Jackson v. United States, 102 Fed. 473, 485 (9 Cir. 1900). But where, as here, the evidence shows not only that the gun was unloaded, but that it was broken and incapable of being discharged, burden of proof nuances are immaterial.

^{4/} The few cases generally cited for the contrary proposition turn on unique state statutes, such as North Carolina's which declare a gun, loaded or not, to be a dangerous weapon. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906). People v. Williams, 6 Mich.App. 412, 149 N.W.2d (1967), on which the Government relies (Gov't Br. at 9-10), also turns on a state statute declaring a "gun" to be a dangerous weapon as a matter of law. The Michigan Supreme Court had earlier construed that statute to obviate the need for proof that the gun was loaded. People v. Doud, 223 Mich. 120, 193 N.W. 884 (1923). It was on the basis of the Doud decision that the Williams court rested its holding. 149 N.W.2d at 247-248. The language quoted by the Government (Gov't Br. at 10) is at best an alternative holding and, as we read the opinion, it is sheer dicta in a case construing a materially different statute.

Conclusion

For the foregoing reasons, and for the reasons set forth in appellant's opening brief, the judgment of conviction on count five should be affirmed; the judgment of conviction on the remaining counts should be reversed, a judgment of acquittal should be ordered on count two, and the case remanded with instructions to afford appellant a new trial on counts one and three.

Respectfully submitted,

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